No 84-1102

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT PHILIBOSIAN, in his offical capacity as District Attorney for the County of Los Angeles, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES AND THE INDIVIDUAL MEMBERS THEREOF, and THE COUNTY OF LOS ANGELES,

Petitioner,

vs.

FEMINIST WOMEN'S HEALTH CENTER, INC., a California nonprofit corporation, and DUNCAN DONOVAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the District Attorney, when charged with that duty, may exercise his discretion in electing between the two means of disposal explicitly provided for by statute (Health and Safety Code, Sections 7054.3 and 25957) without impermissibly entangling government in the affairs of religion.

2. Whether the District Attorney's interrment of fetal tissue in a non-sectarian cemetary, which cemetary later agrees to allow private parties to hold unspecified religious rites over the grave, places the imprimitar of governmental authority upon the private services.

3. Whether the decision of the California Court of Appeal is based upon adequate, independent state grounds.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner prays that a writ of certiorari issue to review the judgment of the California Court of Appeal entered on

June 29, 1984.

OPINION AND JUDGMENT BELOW

The opinion of the California Court of Appeal is attached as Appendix A. The decision of the California Supreme Court not to grant petitioner's Petition for Hearing from the Judgment, filed on September 20, 1984, is attached as Appendix B.

JURISDICTION

The California Supreme Court denied petitioner's Petition for Hearing on September 20, 1984.

Jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3) and Rule 17(1)(b) and (c).

STATUTES INVOLVED

United States Constitution, the First Amendment thereof.

STATEMENT OF THE CASE

This case arose in February, 1982, upon the discovery of over 16,500 fetal tissues or products of abortion in the backyard of one Dr. Malvin Weisberg. Very soon after this discovery, the District Attorney placed an evidentiary hold on the tissues pending any prosecution arising from the tissues. The tissues were found in a rented storage container and were preserved in plastic containers filled with formaldahyde.

Various groups presented themselves to the County offering to take charge of the tissues. Plaintiffs also requested that the tissues be turned over to them for

incinceration. Pierce Brothers Mortuary and Valhalla Memorial Park offered to inter the tissues at no cost to the County. Neither is affiliated with any religious group or denomination. (C.T. 561) Thereafter, plaintiffs filed suit to prevent the District Attorney from turning the tissues over to any group except for incineration. On June 29, 1982, plaintiffs sought and obtained a preliminary injunction in just those terms.

Pending a determination of whether criminal conduct was involved, and wishing to comply with the duty imposed upon him by California Health and Safety Code, Sections 7054.3 and 25957, the District Attorney sought a modification of the preliminary injunction to allow those tissues not immediately needed as evidence to be stored in an underground cement valut, to serve the dual purposes of preserving all

evidence for any future prosecution in accordance with People v. Hitch (1974) 12 Cal. 3d 641, and fulfill any duty to dispose of those tissues in accordance with the dictates of the California Health and Safety Code. Further, since incineration would involve the onerous and costly procedure of draining formaldehyde from each plastic jar before incineration, interrment would be economical. As previously agreed, Valhalla Memorial Park was to provide a burial vault at no cost to the County for this purpose.

Subsequently, Intervenors approached Valhalla Memorial Park to obtain permission to enter their premises after the tissues had been interred and conduct religious rites of an unspecified nature. Thereafter, the District Attorney was made aware of the totally separate arrangement between Valhalla and Intervenors. At no time did

the District Attorney align himself or his office with the beliefs or assertions of the Intervenors. At no time did the District Attorney wish to join the planned services or in any way signify approval thereof, officially or otherwise. At no time did the District Attorney align himself or his office with the beliefs or assertions of the Intervenors. Plaintiffs motion to temporarily restrain the transfer of the tissues to Valhalla was granted on November 3, 1982.

In December, 1982, plaintiffs and defendants noticed motions for summary judgment and/or summary adjudication of the tissues. With regard to the issue of interment of the tissues, the Superior Court ruled in favor of defendants and remarked:

> "Even recognizing that if they dispose of the remains by interment there will be a religious or there

> may be a religious ceremony, as long as they don't participate in arranging for that ceremony but that it is done by interested parties without the participation of the county the intervenors have a right to conduct whatever ceremony they feel is appropriate and there is nothing that requires that the government conduct itself so as to basically foreclose that by incineration." (R.T. Dece. 22, 1982, page 21).

The Court of Appeal reversed, directing that judgment be entered in favor of plaintiffs, finding that the District Attorney had impermissibly given support to a religious cause in violation of the state constitution and United States Constitution.

REASON FOR GRANTING THE WRIT

1. Although the California Court of Appeal relied upon the provision of the California Constitution prohibiting any form of support for religion, the California Court applied Federal authority and tests

implemented by this Court to find an impermissible support of religion. Under such tests, there would be no entanglement or impermissible support of religion.

1

STATUTORY AUTHORITY SPECIFICALLY ALLOWS THE DISTRICT ATTORNEY TO EITHER INTER OR INCINERATE THE TISSUES.

Two methods are prescribed by California Health and Safety Code, Sections 7054.3 and 25957, for the disposal of products of abortion: interrment or incineration. No other method is prescribed. Neither method allowed is favored, one over the other, by the statutory language.

2

THE DISTRICT ATTORNEY IS INVESTED WITH DISCRETION IN THE CONDUCT OF HIS PROSECUTORIAL AUTHORITY.

Teliaferro v. Locke (1960) 182 Cal. App.2d 752, 757, made clear that the District Attorney's authority to institute prosecutions and conduct investigations is unlimited and the use of that authority rests in his own discretion. The disposal of evidence is an integral part of the end of any investigation. Under the circumstances, the District Attorney had the discretion to choose that method of disposal of the tissues which would insure compliance with the law and protect any possible prosecution.

That discretion would also extend to making a decision based upon practicalities of disposal. While incineration of the tissues is now technically possible, and

there are no future prosecutions to consider, such a task would be extremely onerous, involving labor to drain off each container of formaldehyde before the tissues and containers could be incinerated. (C.T. 541).

Although speaking of the court's discretion, the court in California State Univesity, Hayward v. National Collegiate Athletic Assn. (1975) 47 Cal.App3d 533, 544, stated:

> "Discretion is abused in the legal sense 'whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontroadicted evidence.'"

The same test should be applied to the District Attorney's decision to inter the tissues. The single factor of cost of one method over the other should be enough to support the District Attorney's decision to inter. The cost of the labor alone to drain each of the plastic cups of

formaldehyde before the tissues are incinerated could be substantial. On the other hand, at no cost to the County taxpayers, the entire lot could be interred. Upon those facts, the decision to inter is both sound and commendable.

3

THE COURT OF APPEAL ERRED IN APPLYING THE STRICT SCRUTINY TEST TO THE PROPOSED ACT OF INTERRMENT BY THE DISTRICT ATTORNEY.

With no foundation in the record before it, the California Court of Appeal states that "...because the Catholic League [Intervenors] represents a particular religious view and the district attorney's purported action [to inter] would, in effect, sponser and approve that view" the strict scrutiny test should be applied to the proposed interrment. (Appendix A, page 25).

There is no connection between Petitioners and the Intervenors, the Catholic League. Indeed, as the Court of Appeal opinion reflects, the Catholic League intervened for the very reason that it had no connection with Defendants and Respondents and wished to set forth its position to the Court. (Appendix A, page 26). The Court of Appeal apparently construes the subsequent appearance of Intervenors to perform some religious rite after interment as "state action showing a preference for this belief" requiring that it be "strictly scrutinized and must be invalidated unless it is justified by a compelling governmental interest...". (Appendix A, page 27).

Based upon the record before the Court, the District Attorney's proposed interrment of the tissues would constitute nothing more than "incidental benefit" to one or more

religions, if it may be so termed. Such an "incidental benefit" has been repeatedly held to be constitutionally inocous. McGowan v. Maryland (1961) 366 U.S. 420; Gallagher v. Crown Kosher Super Market (1961) 366 U.S. 617; Lynch v. Donnelly (1984) ___U.S. ___, 79 L.Ed.2d 604, 104 S.Ct. 1355.

The Court of Appeal bases its holding of impermissible action by the District Attorney upon the "appearance of a religious purpose in interring the fetuses at Valhalla ... when no secular purpose exists for so doing and where other means exist which do not symbolically support a particular religious viewpoint." (Appendix A, page 30). As pointed out above, a secular purpose does exist to inter the tissues.

Further, the emphasis in the Court of Appeal opinion upon the appearance of religious purpose springs from its reading of Fox v. City of Los Angeles (1978) 22

Cal.3d 792. Fox is entirely inapposite to this case. Not only is there a complete lack of religious symbolism in something so mundane as burial, but there is no attempt by the County or the District Attorney to participate in any form of "display" or "religious rite" after interrment. Distinguishing the lighting of city hall in the shape of a cross on religious holidays and the mere interrment of the tissue without ceremony are numerous facts:

1. No funds are spent for interrment;
2. No on-going display is made by the County;
3. Interrment serves a secular purpose;
4. Disposal of the tissue is mandated while a display of lights on city hall is gratuitous; and,
5. No pronouncement accompanying the interrment would be made by the District Attorney.

Moreover, the Court of Appeal's analysis of the issue of entanglement of government with religion is misplaced. (Appendix A, page 34). The Court of Appeal concedes that no administrative entanglement would exist, but that the "appearance of support by the state, of one side of this controversy over the other, is improper political entanglement." (Appendix A, page 35). The statement by the Court of Appeal that the "act of indirectly turning the fetuses over to Valhalla for religious burial as murdered humans would vitiate the studied neutrality which is the state's constitutional course," is without support in the record. [1/] Moreover, without more, potential

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[1/] The Court of Appeal was presented with a Petition for Rehearing by Intervenor which, inter alia, pointed to the lack of support in the record for the Court's statements concerning the supposed connection between the District Attorney and the Catholic League as well as its statements characterizing the belief of the Catholic League (cont.)

for political divisiveness will not make an official act constitutionally impermissible. Lynch v. Donnelly, supra, at 617 of 79 L.Ed.2d; McDaniel v. Paty (1978) 435 U.S. 618 610, 55 L.Ed.2d 593, 98 S.Ct. 1322.

CONCLUSION

The Court of Appeal has erred in its application of the tests for constitutionality under both the State and Federal Constitutions. Under the three-part test enunciated by the United States Supreme Court, the proposed action by the District Attorney would have a secular purpose (burying would be less costly than

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1/ (cont.)

concerning the tissues as "murdered humans." The Petition for Rehearing was filed on July 13, 1984. The Court of Appeal denied the Petition for Rehaaring on July 16, 1984.

incineration), its principal effect would neither advance nor inhibit religion (burials are performed daily with no intrinsic religious significance, but only that added by the attendent ceremony), and there is no danger of excessive governmental entanglement (the tissues would be interred with no further involvement by the County or the District Attorney).

Also, under the State Constitution, mere interrment by the District Attorney in a cemetary with no religious affiliation does not serve to enhance religion as would the display of a Christian cross on City Hall, school Bible studies, or the pronouncement of a religious observance as a state holiday.

Petitioners request that this Court hear this case because of its unique nature and because of the important issues of law relating to governmental action presented therein.

DATED: December 18, 1984

DE WITT W. CLINTON
County Counsel

By: _____
JOHN W. MC CAULEY
Deputy County Counsel

Attorneys for Petitioners

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FEMINIST WOMEN'S HEALTH CENTER, INC., et al., Plaintiffs and Appellants, v. ROBERT H. PHILIBOSIAN, etc., et al., Defendants and Respondents, THE CATHOLIC LEAGUE, SOUTHERN CALIFORNIA CHAPTER, et al., Intervenors and Respondents.	2 Civil No. 69838 (Super.Ct. No. C413606) COURT OF APPEAL SECOND DIST. FILED JUN 29 1984 CLAY ROBBINS, JR. Clerk Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Eli Chernow, Judge. Reversed and remanded.

Fred Okrand, Carol Sobel, Eve Triffo and Gilbert Gaynor, ACLU Foundation of Southern California, for Plaintiffs and Appellants.

De Witt W. Clinton, County Counsel, Robert C. Lynch, Assistant Chief Deputy County Counsel, and John McCauley, Deputy County Counsel, for Defendants and Respondents.

Paul L. Freese for Intervenors and Respondents.

Feminist Women's Health Center appeals from summary adjudication of issues granted in favor of respondents, Los Angeles County District Attorney and Board of Supervisors, and intervenors/respondents, The Catholic Leage of Southern California. Appellants sought to enjoin the district attorney from disposing of 16,500 fetuses in a private

cemetery where the Catholic League planned a religious ceremony.

This appeal requires us to determine whether the district attorney may constitutionally proceed to bury 16,500 fetuses in a private cemetery that has donated the space, after he is aware that the cemetery has independently contracted with a religious organization to hold a religious burial service and mark the burial site with a memorial plaque. We conclude that he may not and, therefore, reverse the judgment.

Respondent district attorney was contacted by a container company in February of 1982 when approximately 16,500 fetuses and laboratory records were found in a repossessed container at the Woodland Hills home of Malvin Weisberg, the owner of a defunct pathology laboratory in Santa Monica. Weisberg had contracts with various physicians, clinics and hospitals which provided

that after preparing pathology reports on the embryonic and fetal tissues sent to him, he would dispose of the tissue in accordance with state law. State law requires such tissue to be interred or incinerated. (Health & Saf. Code, §§ 7054.3, 25957.) Weisberg stored the tissue properly but, apparently due to his financial difficulties, he did not dispose of it.

The district attorney placed an evidentiary hold on the fetuses and laboratory records and coordinated several county agencies to examine the fetuses to determine whether they constituted evidence of criminal conduct. On hundred and fifty fetuses were found to be of greater than 20-weeks' gestation. At that time, Health and Safety Code section 25953 prohibited abortions of fetuses after 20-weeks' gestation.

The district attorney requested an opinion from the Attorney General as to the constitutionality of the 20-week ban. In April of 1982, the Attorney General responded with an opinion that it was constitutionally enforceable except as to abortions of nonviable fetuses and when necessary to preserve the mother's health or life. (65 Ops.Cal.Atty.Gen. 261, 267.) The district attorney concluded that while only the greater than 20-week fetuses had primary evidentiary value, a defendant in one of the proposed prosecutions might claim that the remaining younger-than-20-week fetuses were of evidentiary value to him. Consequently, the district attorney preferred burial in cement vaults so that the evidence could be preserved and disinterred if necessary.

Meanwhile, various public officials, politicians oand organizations became

involved in the disposition of the fetal tissue.

In March 1982, the Board of Supervisors, after a motion by Michael Antonovich, instructed a Dr. Joseph Wood to perform "autopsies" on 13 of the fetuses. Dr. Wood is a member of the California Pro-Life Medical Association. Dr. Wood provided that organization with unauthorized photographs of 42 "mangled" fetuses. The organization displayed some of these photographs at a news conference at the end of May, which was sponsored by two county supervisors and two state senators. The pictures were displayed on a large board entitled "American Holocaust."

State Senator Alex Garcia tried to claim the "bodies for the purpose of giving a proper decent burial and possibly some kind of memorial."

On May 5, 1982, President Reagan wrote Dr. Dreisbach, the Secretary of the California Pro-L ·e Medical Association, congratulating the organization's decision "to hold a memorial service for these children."

A motion proposed by County Supervisor Michael Antonovich was approved May 18, 1982. It provided that the district attorney be requested to release the less than 20-week fetuses and to request the county counsel's opinion as to who would have the right to possess them.

The county counsel replied on May 28, 1983, that the district attorney was entitled to possession of the fetuses as long as necessary to carry out his duties and that upon completion of these duties, the district attorney had discretion to dispose of them by either interment or incineration.

On April 21, 1982, Robert White, Director of County Health Services, wrote a

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memorandum to "Each Supervisor," describing a meeting of representatives of various county agencies involved with the fetuses. In pertinent part, it stated: "The District Attorney has indicated his intention to release the fetuses, probably within two weeks, to the custody of the Right to Life organization's representative. . . . [¶] . . . . [¶] Pierce Brothers Mortuary has indicated their organization would provide the service of interment of the specimens into a burial plot at no charge to the County. The only compensation mentioned is some equitable recognition for providing this service." Copies of the memorandum were sent to the chief administrative officer, county counsel, the executive officer of the board of supervisors and the district attorney.

At the end of May, the Los Angeles Herald Examiner reported that a spokesperson

for the district attorney had confirmed that the county counsel opinion on the release of the fetuses appeared to remove any obstacle to releasing the tissue to a group wishing to hold a religious service.

Meanwhile, in early May, appellant Feminist Women's Health Center requested the district attorney to release the pregnancy tissue in order to dispose of it according to law. A group called Atheists United made the same request. Neither request was granted. "Upon learning of indications that the District Attorney was preparing to release the aborted tissue . . . to anti-choice organizations which wished to dramatize their opposition to legalized abortion by holding a religious burial service for the aborted tissue," appellants filed as taxpayers a first amended complaint for injunctive and declaratory relief in Los Angeles Superior

Court on June 17, 1982. They argued that the district attorney's action violated the federal and state constitutionally-guaranteed separation of church and state.[1/]

On June 29, 1982, the court issued a preliminary injunction preventing the district attorney from releasing any of the fetal tissue pending a trial on the merits.

In June or July of 1982, the Los Angeles Health Department apparently called a number of cemeteries to find one that would

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1. Appellants also sought to enjoin the release of the fetal examination reports as autopsies because the records would contain private medical information and the identity of women who had undergone induced abortions is protected by Government Code section 6254, subdivision (c).

The complaint further sought to enjoin the district attorney from investigating the physicians who performed abortions and used the Weisberg laboratory. Appellants claimed the Attorney General incorrectly interpreted Health and Safety Code section 25953 and that the investigation for alleged criminal activity chilled the exercise of their fundamental right to chose whether or not to procreate.

inter the tissue free of charge. Valhalla Memorial Park in Burbank agreed to inter the fetuses.

On September 30, 1982, the district attorney asked for a modification of the preliminary injunction to permit him to store and bury the less than 20-week tissue in concrete vaults at Valhalla Memorial Park in Burbank. The district attorney wanted to "lawfully inter" as well as "preserve this evidence for the defense of a possible prosecution."

The district attorney's intention to transfer the tissue to Valhalla was reported in the Los Angeles Times. In late September of 1982, the Catholic League of Southern California and its president Paul Freese, intervenors and respondents herein, executed a contract with Valhalla permitting the league to hold a religious burial service as the tissue was "stored"

ant to place a memorial plaque at the site.[2/]

The Catholic League and Paul Freese sought to intervene in the action on October 7, 1982. Leave to intervene was granted on October 14, 1982.

Appellants' motion to temporarily enjoin transfer of the tissue to Valhalla was granted on November 3, 1982. The intervenors noticed an appeal from the temporary restraining order on November 12, 1982. The cause was then transferred to the trial department since the appeal negated the court's jurisdiction. The court ruled that the temporary restraining order would remain in effect pending a

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2. The record does not reveal the wording of the memorial plaque but one of the intervenor's declarations stated that a previous such plaque read: "Pray that a mother's love be strenghtened that she does not turn against the child of her womb."

ruling on appeal.

In early December, both appellants and respondents moved for summary judgment or in the alternative for summary adjudication of the issues. After a hearing on both motions, the court decreed that: The contract between Valhalla and the Catholic League was made without any state participation or expenditure of public funds, and, therefore, the district attorney's "proposal to inter the fetal remains which are the subject of this case at Valhalla Memorial Park, where intervenors intend to hold a religious ceremony over it, without organizing, holding or otherwise participating in that religious ceremony is not a violation of the First and Fourteenth Amendments to the United States Constitution or article I, section 4 and article IVI [sic], section 5 of the California Constitution. Accordingly, defendants are expressly permitted

to dispose of the fetal remains in a manner consistent with this order."[3/]

The court granted a 20-day stay of its order in accordance with the judgment. Appellants promptly petitioned for a writ of mandamus and temporary stay order. The petition was denied, but the order permitting the respondents to bury the fetal tissue was stayed until March 17. Appellants then petitioned the California Supreme Court for extraordinary relief. That court ruled that pending a final determination of any

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3. The judgment also provided that: (1) The prohibition of Health and Safety Code section 25953 against abortion after the twentieth week of pregnancy is unconstitutional; (2) the district attorney is permanently enjoined from prosecuting any person based on the length of gestation of a pregnancy when terminated; and (3) the district attorney is permanently enjoined from divulging the names of the women or doctors involved in the abortions which produced the fetal tissue. Respondents and intervenors did not appeal.

timely appeal, the stay of the order permitting burial was to remain in effect.

Appellants then appealed from the parts of the judgment declaring that burial at Valhalla was not constitutionally prohibited.

Appellants argue that the district attorney's burying the aborted tissue at Valhalla where the event will be commemorated by a religious ceremony and memorial plaque:

(1) is unconstitutional because the state may not do indirectly that which it may not do directly, i.e., sponsor a religious ceremony;

(2) violates the separation of church and state guaranteed by the federal and state Constitutions; specifically, the establishment clause of both Constitutions and article XVI, section 5 of the California Constitution;

(3) impermissibly undermines fundamental rights of privacy and procreative choice.

Respondents argue they had a mandatory duty to preserve potential evidence, that they now have a duty to promptly dispose of the tissue as required by law, and that it is within their discretion to choose between lawful alternative methods of disposal. They deny that the district attorney ever treated the tissue as human beings and claim there is an insufficient relationship between the district attorney and the Catholic League's activities. Respondents argue their action has a secular purpose because its primary effect is to lawfully dispose of the remains, not to aid religion. Respondents further argue that their actions do not violate any provision of the California Constitution. Finally, respondents contend that appellants have no standing to assert the privacy rights of women not a

party to this action, and that, in any event, no violation of privacy or right of procreative choice is threatened.

Intervenors generally echo respondents' arguments but they also maintain that "the Constitution does not prohibit regard for the infant in the womb," and, therefore, "the question of life" is not a religious issue.

I

In their argument that the state cannot do indirectly what it is forbidden to do directly, appellants creatively use state action analysis drawn from equal protection cases to demonstrate impermissible state action in this case. We decline to follow this analysis because state action, in the context argued, is a tool for prohibiting private conduct by finding a sufficient relationship between the private conduct and the state. (Burton v. Wilmington Pkg.

Auth. (1961) 365 U.S. 715.) The Catholic League's private conduct consisting of speech or the holding of religious services is protected by the Constitution of the United States and the Constitution of California. The public conduct which appellants seek to enjoin is clearly state action. The issue before us is whether the state action is unconstitutional.

II

The California Constitution prohibits the Legislature from making law "respecting an establishment of religion." The California establishment clause also states that the rights it guarantees are not dependent on those guaranteed by the United States Constitution. (Cal.Const.,art.I, §§ 4, 24.)

Some rights guaranteed by the California Constitution are not guaranteed by the United States Constitution. (Cal.Const.

art I. § 24; People v. Brisendine (1975) 13 Cal.3d 528, 548-550.) With certain exceptions not here relevant, California courts alone determine the rights guaranteed by the California Constitution so long as those rights extend equal or greater protection to those guaranteed by the federal Constitution under totally similar provisions of the Bill of rights. (Mandel v. Hodges (1976) 54 Cal.App.3d 596, 616.) Therefore, we examine the constitutionality of the proposed action on independent state grounds. However, since only three California cases have considered our state's establishment clause,[4/] we also consult principles of federal cases as they seem compelling guides to uncharted state grounds.

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4. Fox v. City of Los Angeles (1978) 22 Cal.3d 792; Johnson v. Huntington Beach Union High Sch. Dist. (1977) 68 Cal.App.3d 1; Mandel v. Hodges, supra, 54 Cal.App.3d 596.

We note two factors at the outset. First, most of the federal cases analyzing the establishment clause test statutes to determine if they violate the clause. Here, there is no legislative action, instead we are asked to consider whether the district attorney's executive action violates the establishment clause.

The district attorney has discretion to initiate and conduct prosecutions. (Gov. Code, § 26500; Taliaferro v. Locke (1960) 182 Cal.App.2d 752.) Since the fetuses came into his possession as potential evidence in a criminal investigation, the disposal of the evidence is his responsibility. His executive action in the proposed disposal is an outgrowth of the legislative act which conferred prosecutorial discretion upon him.

An executive action taken in the exercise of power vested in the executive by

legislative enactments can be prohibited by the establishment clause. (Mandel v. Hodges, supra, 54 Cal.App.3d at p. 611.) Consequently, we apply the principles of case law which were formulated in the analysis of statutes even though we are dealing with an executive action.

Secondly, the case before us is factually distinguishable from all precedents. In our effort to apply existing principles to this unique situation, we will treat the classic methods of determining establishment clause violations as "touchstone[s] with which to identify instances where the objectives of the establishment clause have been compromised. [Citation.]" (Johnson v. Huntington Beach Union High Sch. Dist., supra, 68 Cal.App.3d at p. 11.) The establishment clause was written to protect against "'sponsorship, financial support, and active involvement of the sovereign in

religious activity.'" (Meek v. Pittenger (1975) 421 U.S. 349, 358-359, quoting Walz v. Tax Commission (1970) 397 U.S. 664, 448.)

In 1971, the United States Supreme Court enunciated three tests for determining whether a given law complied with the establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation]; finally, the statute must not foster 'an excessive government entanglement with religion.' [Citation.]" (Lemon v. Kurtzman (1971) 403 U.S. 602, 612-613.) These three tests "are intended to apply to laws affording a uniform benefit to all religions, and not to provisions . . . that discriminate among religions." (Larson v. Valente, (1982) 456 U.S. 228, 246.) When the law at issue

grants a denominational preference "we treat the law as suspect and . . . we apply strict scrutiny in adjuding its constitutionality." (Larson v. Valente, supra, at p. 246.)

Appellants argue that the district attorney's action is unconstitutional under either the Lemon or Larson test, but that the strict scrutiny test is applicable here because the government action involved demonstrates official support for the religious views of a particular group. "[N]ot all religions hold that aborted fetuses are 'persons' who must be buried, and equate abortion with homicide. but the Roman Catholic religion does, and the intervenors are Catholics who adhere to those beliefs." The district attorney argues that his act is nondenominational because any other denomination is free to act with respect to the burial. Intervenors

claim that the "record does not justify any inference that the question about life is only a sectarian concern."

The United States Supreme Court has recently expressed its "unwillingness to be confined to any single test or criterion in this sensitive area. [Citations.]" (Lynch v. Donnelly, 52 U.S.L.Week 4317, 4320.)[5/] We concur in the conclusion that no one test is definitive. However, inthe case before us, applying either the Lemon or the Larson tests to the California establishment clause we conclude that the act of burying at Valhalla in the context described, violated religious guarantees of the California Constitution.

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5. Nonetheless, Justice Brennan's dissent in Lynch v. Donnelly, supra, notes that only in March v. Chambers (1983) 51 U.S.L. Week 5162, was neither the Lemon analysis nor strict scrutiny applied. (Lynch v. Donnelly, supra, at p. 4325, fn. 2 (dis. opn. of Brennan, J.).)

The strict scrutiny test is applied to an establishment clause issue when government activity shows a preference for one religion over another. (Larson v. Valente, supra, 456 U.S. at p. 246.) It is appropriate here because the Catholic League represents a particular religious view and the district attorney's purported action would, in effect, sponsor and approve that view.

In the application to intervene, Paul Freese, President of the Catholic League, stated: "Together with many other citizens having religious convictions, I believe, based both on religious and scientific information, that a fetus is an infant, a human and spiritual being, and my brother or sister in Christ. Catholics and others sharing spiritual perceptions of life have constitutional rights to assemble and to express views, religious or otherwise, about

the spirituality of life through public prayer or other peaceful manifestations of belief and to convey thereby their opinion about the tragic defamation of life and soul as perceived in the occurrences and circumstances made known by the pleadings herein."

The reason alleged for intervention was because "it is necessary that representatives of religious viewpoints be allowed to intervene to protect their constitutional rights against infringement by a hostile philosophic group."

The complaint in intervention states that the Catholic League is a California corporation "specifically designed to assist Catholics and others in the protection of their civil rights and religious freedom of Americans." The Catholic League alleged that the purpose of Feminist Women's lawsuit was to prevent the district attorney "from

giving proper and customary deference to persons who have a legitimate interest under the law in recovering possession of the bodies or in giving religious attention to what are regarded by [the Catholic League] as creatures of God having eternal destinies."

It is clear from the record that the Catholic League is a religious organization which regards a fetus as a human being and abortion as murder. While this specific belief may well cross sectarian lines, it is a belief not universally held. Consequently, any state action showing a preference for this belief will be strictly scrutinized and must be invalidated unless it is justified by a compelling governmental interest with which "it is closely fitted to further [that] interest." (Larson v. Valente, supra, 456 U.S. at pp. 248-249.)

Originally, the district attorney maintained that his primary interest in interring

the fetuses at Valhalla was so they could be disinterred if needed for evidence. The state's need to preserve the fetuses as evidence no longer exists. The court below permanently enjoined the district attorney from criminally prosecuting anyone under any statute based on the length of gestation of a pregnancy. That decision was not appealed.

In his brief to this court, the district attorney states he does not now intend to commence any criminal prosecution in connection with these fetuses. Therefore, the district attorney's only interest in regard to the fetuses is to dispose of them lawfully. Health and Safety Code sections 70543 and 25957 provide that fetal remains shall be promptly disposed of by interment or incineration.

The fetal remains of abortions performed at public medical facilities in Los Angeles

County are incinerated without ceremony at county facilities or at private hospitals. The record reflects that although these fetuses are preserved in formaldehyde, they could still be disposed of in this manner. Thus, there is no compelling state interest to dispose of the fetuses in a private cemetery. The fact that Valhalla would dispose of the fetuses at no cost to the county is not sufficient compelling interest to justify the appearance of state sanction of a particular religious belief.

III

The same conclusion of unconstitutional behavior is reached through the three tests of Lemon v. Kurtzman, supra, 403 U.S. 602. We find no secular purpose in the proposed act; its primary effect enhances religion; and it creates excessive political entanglement with religion.

The right to injunctive relief must be determined as of the date of an appellate court's decision. (White v. Davis (1975) 13 Cal.3d 757, 773, fn. 8.) Therefore, the fact that the fetuses need no longer be preserved as evidence eliminates the secular purpose of interring them at Valhalla. Governmental purpose may be inferred from the act itself to contradict the government's avowed purpose. (Stone v. Graham (1980) 449 U.S. 39, 41.)

We perceive the purpose test to be objective in nature. Here, in the context of earlier publicity stating the district attorney's intention to turn the fetuses over to a pro-life group for religious burial, the appearance of a religious purpose in interring the fetuses at Valhalla is sufficient to prohibit that action when no secular purpose exists for so doing and where other means exist which do not

symbolically support a particular religious viewpoint. "[T]he very symbolism of conspicious governmental aid to identifiably religious enterprise is regarded as an independent evil. Indeed . . . nothing short of a concern with such symbolism could distinguish those cases of aid to the religious enterprise which the Court has deemed impermissible from those which the Court has readily tolerated. Apart from the significance of symbols in establishing precedence for a more dangerous incursion, the fact of symbolic governmental identification with a religious activity must be understood to constitute a separate evil in a system that regards matters of religious concerns as ultimately delegated to individual and community conscience." (L. Tribe, American Constitutional Law (1978) p. 868.) The state must not only maintain the reality of separation

with the church; it must also maintain the appearance of such separation. (Fox v. City of Los Angeles, supra, 22 Cal.3d at p. 804 (conc. opn. of Bird, C.J.).)

No clear secular purpose exists for burial at Valhalla; under the Lemon test this is conclusive of the uncontsitutionality of that act. (Mandel v. Hodges, supra, 54 Cal.App.3d at p. 613.) We, nevertheless, apply the other Lemon criteria.

In denying that the primary effect of this action is the enhancement of religion, respondents and intervenors argue that any religious effect from the burial ceremony arises from the protected expression of the Catholic League and not from any government action. We disagree.

The Catholic League has a constitutionally protected right to express their view that the fetuses are murdered humans and to publicly mourn them. They do not have

the right, however, to have the state's imprimature on that expression.

Either the public act of disposing of the fetuses with no government display of religiosity, or the private expression of protected ideas would be proper. The impropriety comes from proceeding with the public act when the private group's intent to use that public act to frame and support the private expression is widely known.

The state's delivery of the fetuses is the reason for the planned event. The League asserts in its brief: "It is precisely because there may be a national audience for any speeches made at the memorial service that the appellants seek judicial suppression of the event."

The primary effect of the district attorney's burying the fetuses at Valhalla would be to give symbolic support to the religious views of the Catholic League.

Consequently, to do so would violate the establishment clause.

Excessive entanglement of the state with religion can result from administrative entanglement (Lemon v. Kurtzman, supra, 403 U.S. at pp. 624-625 (conc. opn. of Douglas J.)), or from political entanglement (Committee for Public Education v. Nyquist (1973) 413 U.S. 756, 797-798). The potential for political divisiveness based on differences in religous views is a factor in judging the constitutionality of state action. (Committee for Public Education v. Nyquist, supra, at pp. 797-798; Meek v. Pittenger, supra, 421 U.S. at p. 372; Lynch v. Donnelly, supra, 52 U.S.L. Week at pp. 4326-4327 (dis. opn. of Brennan, J.).)

"The potential divisiveness of political division along religious lines was one of the principal evils against which the First

Amendment was intended to protect." (J. Zoetewey, Excessive Entanglement: Development of a Guideline for Assessing Acceptable church-State Relationships (1976) 3 Pepperdine L.Rev. 279, 287, discussing Lemon v. Kurtzman, supra, 403 U.S. at p. 622.)

The propsoed burial at Valhalla does not present any administrative entanglement with religion since the district attorney plans to deliver the fetuses and leave. It does, however, cause political entanglement. The abortion issue is one of the most emotionally explosive issues in today's political firmament. The appearance of support by the state, of one side of this controversy over the other, is improper political entanglement. The act of indirectly turning the fetuses over to Valhalla for religious burial as murdered humans would vitiate the studied neutrality which is the state's constitutional course. The

proposed action would aggravate an already volatile religious issue.

Under the federal Constitution, no case has held that political entanglement alone will support a finding of unconstitutionality. The potential political divisiveness of the district attorney's proposed action is, however, in the unique situation before us, an important factor in reaching that determination under the California Constitution.

In conclusion we find the proposed burial at Valhalla would violate the establishment clause of the California Constitution.

IV

The "no preference of religion clause" of the California Constitution provides additional grounds for a finding of unconstitutionality. Article I, section 4 of the California Constitution states: "Free

exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion." The California Supreme Court has interpreted this section as being broader than the federal guarantee because preference is forbidden even when there is no discrimination. (Fox v. City of Los Angeles, supra, 22 Cal.3d at p. 796.) Referring to this clause, the Attorney General's office has said: "It would be difficult to imagine a more sweeping statement of the principle of government impartiality in the field of religion." (25 Ops.Cal.Atty.Gen. 316, 319 (1955).)

In Fox, supra, the California Supreme Court held that a preference was unconstitutionally shown to one religion by the illumination of a huge cross on the Los Angeles City Hall at Christmas and Easter.

The concurring opinion noted that even though the city's stated purpose was to promote "'peace and good fellowhip toward all mankind,'" in fact a preference had occurred. "Whatever the city's subjective purpose, an impermissible religious preference has objectively resulted." (Fox v. City of Los Angeles, supra, 22 Cal.3d at p. 804 (conc. opn. of bird, C.J.).) We find this principle particularly apt in the case before us. Whatever the district attorney's motive, a preference will be objectively demonstrated if the fetuses are delivered to Valhalla in these circumstances. As the concurring opinion observed in Fox: "We must never forget that the religious freedom of every person is threatened whenever government associates its powers with one particular religious tradition. The threat today may seem small, but the breach in principle is large."

(Fox v. City of Los Angeles, supra, at p. 805.)

We find that the district attorney's proposed action would express an unconstitutional preference for the views of the Catholic League.

V

Yet another basis for holding the proposed act unconstitutional under the California Constitution is article XVI, section 5, which forbids official aid to any "religious sect, church, creed, or sectarian purpose, . . ." This has been interpreted as banning "any official involvement, whatever its form, which has the direct, immediate and substantial effect of promoting religous purposes." (California Educational Facilities Authority v. Priest (1974) 12 Cal.3d 593, 605, fn. 12.) Article XVI, section 5 "was intended to insure the separation of church and

state and to guarantee that the power, authority and financial resources of the government shall never be devoted to the advancement or support of religous or sectarian purposes." (Id., at p. 604.) The prohibited aid under this section includes aid "in the intangible form of prestige and power." (Fox v. City of Los Angeles, supra, 22 Cal.3d at p. 802 (conc. opn. of Bird, C.J.).)

We perceive that the intended burial ceremony will enlist the prestige and power of the state. This is constitutionally forbidden.

For all the reasons stated herein, it would be equally improper for the district attorney to release the tissue to any of the parties to this action.

Given the conclusions reached as to the unconstitutionality of the proposed action, we need not and do not consider

appellants' argument that the proposed method of burial violates the privacy rights of the parents of the fetuses and undermines procreative choice.

The judgment is reversed. The cause is remanded to the trial court which is directed to enter a declaratory judgment consistent with this opinion.

CERTIFIED FOR PUBLICATION.

WOODS, P.J.

We concur:

KINGSLEY, J.

McCLOSKY, J.

APPENDIX B

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 4, Civil No. 69838

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

FEMINIST WOMEN'S HEALTH CENTER, INC., et al., Appellants,

v.

PHILIBOSIAN, AS DISTRICT ATTORNEY, etc., et al., Respondents;
CATHOLIC LEAGUE, SOUTHERN CALIFORNIA CHAPTER, et al., Respondents.

SUPREME COURT
FILED
SEP 20 1984

Laurence P. Gill, Clerk

_____
Deputy

Petitions for hearing DENIED.

(Cal. Const., Art. IX, Section 8 and Art. XIII, Section 24; California Educational Facilities Authority v. Priest (1974) 12 Cal.3d 593, 604.)

Lucas, J., is of the opinion the petition should be granted.

BIRD
Chief Justice